

FAR-23888

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

SUPREME JUDICIAL COURT
NO.

APPEALS COURT
NO. 2014-P-1220

COMMONWEALTH

v.

CALVIN HORNE

APPLICATION FOR FURTHER APPELLATE REVIEW

REBECCA A. JACOBSTEIN

ATTORNEY FOR DEFENDANT-APPELLANT

COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 BROMFIELD STREET
BOSTON, MA 02108
617.910.5726
rjacobstein@publiccounsel.net
BBO# 651048

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NOW COMES Calvin Horne, by and through counsel,
Rebecca A. Jacobstein, and respectfully requests that
this Honorable Court grant further appellate review of
the Appeals Court decision, entered October 20, 2015,
which approved the admission and substantive use of
reverse profiling evidence against Mr. Horne.

Respectfully Submitted:
Calvin Horne

By his attorney,


Rebecca A. Jacobstein

BBO# 651048

Committee for Public Counsel Services

44 Bromfield Street

Boston, MA 02108

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MEMORANDUM IN SUPPORT OF
APPLICATION FOR FURTHER APPELLATE REVIEW

STATEMENT OF PRIOR PROCEEDINGS

Calvin Horne was charged with seven separate offenses as a result of his encounter with the police on September 14, 2012. R:11. After a three-day jury trial, Mr. Horne was acquitted of the first three counts: unlawful possession of a firearm, G. L. c. 269, § 10(a); unlawful possession of ammunition, G. L. c. 269, § 10(h); and carrying a loaded firearm, G. L. c. 269, § 10(n). R:11. He conceded guilt on, and was subsequently convicted of, two counts of assault and battery on a police officer, in violation of G. L. c. 265, § 13D, and one count of resisting arrest, in violation of G.L. c. 268, § 32B. R:11; T1:146-147. He is not appealing these convictions.

Mr. Horne did, however, contest his guilt on the indictment charging him with possession of a class B substance (cocaine) with intent to distribute, in violation of G. L. c. 94C, § 32A(c). R:11.

Nonetheless, the jury convicted Mr. Horne on this count; he then pleaded guilty to the subsequent offense portion of the indictment, pursuant to G. L. c. 94C, § 32A(d). R:9, 11. The court (Giles, J.) sentenced Mr. Horne to four to six years in prison on the charge of possession with intent to distribute, with a consecutive two and a half years in the house of corrections on one count of assault and battery on a police officer. R:9. On the second assault and battery on a police officer and the resisting arrest charges, Mr. Horne received concurrent two-year terms of probation, from and after the completion of the committed portion of his sentence. R:9.

Mr. Horne filed a timely Notice of Appeal on January 24, 2014, and his case was entered in the Appeals Court on August 7, 2014. His conviction was affirmed by the Appeals Court in a Memorandum and Order Pursuant to Rule 1:28 on October 20, 2015. See attached.

SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL

As stated above, on appeal, Mr. Horne is only contesting his conviction for possession with intent to distribute. The Commonwealth claimed the following evidence proved that Mr. Horne intended to sell the drugs purportedly in his possession: 1) the crack cocaine was in twenty-six individually packaged bags; 2) there were multiple cell phones in the center console of the car; 3) there were eighty-three dollars in the center console of the car; and 4) Mr. Horne did not meet the physical or economic characteristics of a crack addict. T3:33-34. On appeal, and in this application for further appellate review, Mr. Horne contests the admissibility of the purported physical and economic characteristics of a crack addict. Specifically, Mr. Horne challenges the following testimony as impermissible profile evidence.

Testimony of the Drug Expert

The Commonwealth offered the testimony of Detective William Feeney as a drug expert; he did not work on this case. T2:138. Detective Feeney testified to the purported typical physical characteristics of crack cocaine addicts. He claimed that the physical appearance of crack cocaine addicts deteriorates over

time, and they become unkempt and very thin, with rotted teeth from crack use or teeth worn down from constant grinding due to their addiction. T2:143.

Mr. Horne similarly challenges as profile evidence Detective Feeney's testimony regarding the supposed economic characteristics of crack addicts. According to Detective Feeney, the largest number of bags he ever recovered from users was five ten-dollar bags, after several addicts had pooled their resources. T2:143. He claimed that crack addicts do not have more on them because they have limited funds. T2:144.

Commonwealth's Closing

In its closing, the Commonwealth relied on the profiling evidence to support its argument that Mr. Horne was a drug dealer and not a drug user. T3:33-34. Specifically, the Commonwealth argued:

How do you know [Mr. Horne] possessed it with the intent to distribute it, does he look like a drug addict? You saw the pictures of him, drug addicts, particularly crack cocaine addicts are skinny, they are thin, they have rotted teeth, they are drawn out.

He's a big man, he's a big muscular man who gave it to Sergeant Brooks quite frankly and Officer Pele, and they needed assistance to get him. He is not a drug addict; he possessed it with intent to distribute it.

He has multiple cellular telephones; he's running around with 26 rocks. A crack addict as Sergeant Detective Feeney told you typically at the most he's ever seen in his time had five rocks. T3:33-34.

Appeals Court's Ruling

Relying on its prior holding in *Commonwealth v. Carabello*, 81 Mass. App. Ct. 536 (2012), the Appeals Court ruled that "[t]he expert did not testify that the defendant fit a profile of a certain kind of criminal. Rather, the expert testified about the physical characteristics of a 'crack' cocaine dependent person." See attached Memorandum and Order Pursuant to Rule 1:28.

POINT FOR WHICH FURTHER APPELLATE REVIEW IS SOUGHT

Mr. Horne seeks further appellate review on the issue of whether the Commonwealth can introduce and rely upon "reverse profiling" evidence. In this case, the Commonwealth presented evidence of a typical crack addict, presented evidence of Mr. Horne's non-conformity therewith, and then argued that the jury should infer that Mr. Horne was a drug dealer because he did not meet the expected profile of a drug user. While the Appeals Court has concluded that such "reverse profiling" evidence is admissible, this holding is in direct contradiction to this Court's

admonition that profiling evidence is by its very nature irrelevant and immaterial at a criminal trial which should be "an individualized adjudication of a defendant's guilt or legal innocence." *Commonwealth v. Day*, 409 Mass. 719, 723 (1991).

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

Further appellate review is in the public interest because the Appeals Court's decision, which held that evidence of typical physical characteristics of crack cocaine addicts is admissible to show non-conformity therewith, is contrary to the consistent administration of justice. If profiling evidence is inadmissible, because the fact that a person meets a stereotypical profile does not tend to prove he committed the charged offense, then reverse profiling evidence should be similarly inadmissible, because the fact that a person does not meet a profile of an addict does not mean they are not an addict.

ARGUMENT

EXPERT TESTIMONY THAT A CRACK ADDICT DISPLAYS TYPICAL PHYSICAL CHARACTERISTICS IS INADMISSIBLE AND THE COMMONWEALTH'S ARGUMENT THAT A PERSON WHO DOES NOT MATCH THOSE EXPECTED CHARACTERISTICS IS A DRUG DEALER IS REVERSE PROFILING AND SHOULD NOT BE ALLOWED.

Profiling evidence is inadmissible. Yet the Commonwealth elicited testimony that crack cocaine

addicts are unkempt, very thin with rotted teeth, and would not have in their possession eighty-three dollars or twenty-six baggies because addicts have limited funds. T2:143-144. Then, compounding the error, the Commonwealth in its closing told the jury that because Mr. Horne did not match these stereotypes he must be a drug dealer rather than a drug user. T3:33-34. This Court should hold that reverse profiling evidence is inadmissible and arguments based thereon are improper.

The admission of the physical and economic characteristics of drugs addicts was error. "Expert testimony may not be admitted to profile or describe the typical attributes of the perpetrators of crimes." See *Commonwealth v. Goetzendanner*, 42 Mass. App. Ct. 637, 644 (1997). Profile evidence is inadmissible because whether or not a person meets a stereotypical profile does not tend to prove he committed the charged offense. See *Commonwealth v. Day*, 409 Mass. 719, 723 (1991).

Both this Court and the Appeals Court have ruled that expert testimony describing common characteristics of drug users is inadmissible. See *Commonwealth v. Johnson*, 76 Mass. App. Ct. 80, 85

(2010), S.C., 461 Mass. at 1013 (testimony describing typical crack user improper); *Commonwealth v. Jackson*, 45 Mass. App. Ct. 666, 671 (1998) (description of a characteristic of drug buyers inadmissible).

Nevertheless, the Appeals Court has ruled here, in reliance on *Commonwealth v. Carabello, supra*, that an expert may testify that a defendant did not exhibit the characteristics of drug-dependent individuals to support the inference that the defendant was a drug dealer. *Id.* at 539. This "reverse profiling" should be deemed similarly inadmissible.¹

The prohibition against profiling extends to the expected economic characteristics of crack cocaine users, as well. For instance, the Appeals Court held, and this Court concurred, that the Commonwealth may not present evidence that crack users would never have \$3500 to buy ninety-eight grams of cocaine because their priority is to get high and if crack users had any money on them, they would use it to buy crack. See *Commonwealth v. Johnson*, 76 Mass. App. Ct. at 85,

¹ Defense counsel objected to Detective Feeney's testimony regarding the typical physical profile of a drug user. T2:141. Counsel objected on the grounds that the testimony was "getting a little wonky," as well as on the grounds that she did not receive notice of this testimony and that it was beyond the scope of his expertise. T2:141.

S.C., 461 Mass. 1012 (2012). See also *Commonwealth v. Little*, 453 Mass. 766, 771 (2009) (economic argument, how theoretical buyers would behave, beyond narcotics investigator's expertise). It was similarly improper, then, to elicit testimony and argue in closing here that crack cocaine users have limited funds and would not have twenty-six baggies or eighty-three dollars in their possession.


Mr. Horne was prejudiced by the improper admission of this testimony. Profiling evidence is inherently prejudicial. See *Commonwealth v. Day*, 409 Mass. at 723 ("use of criminal profiles as substantive evidence of guilt is inherently prejudicial to the defendant"). Reverse profiling evidence should be treated no differently.

CONCLUSION

Further appellate review should be allowed on the issue of whether reverse profiling evidence such as that presented here is inadmissible and whether the Commonwealth is permitted to argue that a person who does not conform with the physical characteristics of a stereotypical drug user must not be a drug user, but instead, a drug dealer.

Respectfully Submitted:
Calvin Horne

By his attorney,

A handwritten signature in black ink, appearing to read "R. A. Jacobstein". The signature is fluid and cursive, with the first name "Rebecca" and last name "Jacobstein" clearly legible.

Rebecca A. Jacobstein
BBO# 651048
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
617.910.5726
rjacobstein@publiccounsel.net

Date: 11/9/15

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14-P-1220.

APPEALS COURT OF MASSACHUSETTS

88 Mass. App. Ct. 1109; 2015 Mass. App. Unpub. LEXIS 984

October 20, 2015, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

JUDGES: Cypher, Milkey & Hanlon, JJ.

OPINION*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The defendant, Calvin Horne, appeals following convictions by a Superior Court jury of two counts of assault and battery on a police officer, resisting arrest, and possession of cocaine with intent to distribute. The defendant was found not guilty of various firearms offenses. On appeal, the defendant argues that the narcotics expert's testimony should not have been admitted as it constituted improper profiling evidence and that the Commonwealth violated its discovery obligations by not detailing certain testimony to which the expert testified.

The admission of the expert testimony was not improper. The expert did not testify that the defendant fit a profile of a certain kind of criminal. Rather, the expert testified about the physical characteristics of a "crack" cocaine dependent person. Therefore the judge did not

abuse her broad discretion by admitting the expert testimony. See *Commonwealth v. Caraballo*, 81 Mass. App. Ct. 536, 539, 965 N.E.2d 194 (2012).

The defendant has not shown how the Commonwealth failed to comply with the terms of *Mass.R.Crim.P. 14(a)(1)(A)*, as amended, 444 Mass. 1501 (2005). The Commonwealth provided timely notice that it would use expert testimony concerning street-level narcotics activity and that the expert would offer an opinion that the narcotics were packaged for distribution and whether the quantity was consistent with personal use or distribution. The testimony of the expert fell within those parameters, even if it had not been anticipated by defense counsel.

The defense at trial was that the defendant did not possess the cocaine. The expert's testimony did not denigrate that defense. Recognizing that, the defendant argues that had he realized the scope of the expert's testimony, he would have offered an alternative defense: that he could have been a cocaine user and that the cocaine could have been for personal use. The defendant did not seek a continuance or other remedy at trial.

This issue is raised on appeal without the benefit of a motion for new trial, which arguably might have provided a foundation for assessing defense counsel's strategic choices. However, considering the evidence, such as the fact that the cocaine was packaged in twenty-six individual bags, among other indicia of distribution, we can conclude, even on a cold record, that such a defense was not viable. Thus, even if we were to conclude that the Commonwealth violated the requirements of *Mass.R.Crim.P. 14(a)(1)(A)*, the defendant cannot demonstrate prejudice or a substantial risk of a miscarriage of justice.

Judgments affirmed.

By the Court (Cypher, Milkey & Hanlon, JJ.),

1 The panelists are listed in order of seniority.

Entered: October 20, 2015.